

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DUANE K. SCHROEDER

Claimant

VS.

NATIONAL BEEF PACKING COMPANY

Respondent

AND

ZURICH AMERICAN INSURANCE COMPANY

Insurance Carrier

Docket No. 1,036,601

ORDER

Claimant appealed the December 17, 2007, Order Denying Benefits entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on February 15, 2008, in Wichita, Kansas.

RECORD

The record in this appeal includes the following: the transcript of the December 5, 2007, Preliminary Hearing; the transcript of the November 6, 2007, deposition of Debra Jenson; the transcript of the November 6, 2007, deposition of James Slattery with Exhibits 1 and 2; the transcript of the November 29, 2007, deposition of Duane K. Schroeder with Exhibit 1; the transcript of the November 29, 2007, deposition of Kelin Valladares; the transcript of the November 29, 2007, deposition of Norma Clark; the transcript of the November 29, 2007, deposition of Susan Stephens with Exhibit 1; the transcript of the November 29, 2007, deposition of Robert Strader, II, with Exhibit 1; the transcript of the December 12, 2007, deposition of Muhammad A. Khan, M.D., with Exhibits 1 through 3; the Stipulation with attachments filed by the parties with the Division of Workers Compensation on December 17, 2007; and the pleadings contained in the administrative file.

ISSUES

This is a claim for an August 2, 2007, accident, in which claimant sustained severe injuries when he struck a chain link fence on his motorcycle after leaving respondent's plant. In the December 17, 2007, Order, Judge Fuller denied claimant's request for

preliminary hearing benefits. The Judge found claimant failed to prove (1) his high blood pressure was related to his employment, (2) respondent was negligent concerning the medical care and advice it provided claimant regarding his blood pressure, and (3) his accident was compensable under the going and coming rule.

Claimant contends Judge Fuller erred by finding his accident was not compensable under the Workers Compensation Act. He argues his accident arose out of and in the course of his employment with respondent for several reasons. First, claimant argues his accident was caused by respondent's negligence by failing to properly treat his high blood pressure and by allowing him to drive home with elevated blood pressure readings. In his brief to this Board, claimant also asserts it is arguable that staffing a medical station with an EMT may be inappropriate and that respondent deviated from an appropriate standard of care by failing to record and document his past visits to the medical station. Second, claimant argues his accident allegedly occurred on the only available route to and from work, which was not used by the public for any reason other than doing business with respondent and which had a special risk or hazard. And third, in his brief claimant contends his high blood pressure readings immediately before his accident were caused by his work as he had been under stress trying to find parts for the equipment in respondent's plant. In short, claimant asks the Board to reverse the December 17, 2007, Order and find this accident compensable under the Workers Compensation Act.

Conversely, respondent and its insurance carrier contend the December 17, 2007, Order should be affirmed. They argue claimant's accident is not compensable under the Workers Compensation Act because it occurred either as the result of a personal condition (high blood pressure) or the negligent operation of his new motorcycle. They deny claimant's accident is compensable as an exception to the going and coming rule because respondent was neither negligent in treating claimant's high blood pressure nor by permitting him to drive home. They also assert claimant's accident did not occur on respondent's premises, nor on the only available route to respondent's plant, nor on a route only used by respondent's employees, nor on a route that entailed any type of special risk or hazard.

The only issue before the Board on this preliminary hearing appeal is whether claimant's accident arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes the preliminary hearing Order should be affirmed.

Claimant is employed by respondent as a maintenance trainer, which is part of respondent's management hierarchy. In the early hours of August 2, 2007, claimant

sustained serious injuries upon leaving respondent's meat processing plant when his motorcycle, which he had purchased less than 24 hours before, struck a chain link fence surrounding an electric substation across the street from respondent's plant. A four-lane street separated the substation from respondent's premises. The accident occurred as claimant exited one of the drives from respondent's plant and failed to turn left or right upon that street but, instead, traveled across the street and into the fence.

Claimant, who suffered a severe head injury in the accident, does not recall some details regarding his activities at work on the evening of August 1, 2007, but he does recall purchasing his motorcycle around noon that day and riding it approximately 50 miles before reporting to work about 7:00 p.m. According to claimant, his memory is recovering.

Claimant has a history of high blood pressure, which he treats with medication. But upon arriving at work on August 1, 2007, he recalls he was feeling well. He does not recall, however, that upon arriving at work he spoke with staff in the medical station about his new motorcycle. Conversely, he recalls going to the medical station at about 11:00 p.m. that night for a blood pressure check after experiencing a bloody nose, which he attributed to increased blood pressure from being upset over being unable to find some needed parts. The EMT in the medical station, James Slattery, took claimant's blood pressure and told claimant he could not work.

After leaving the medical station, claimant recalls talking to the night supervisor about not being able to work and showing his motorcycle to some co-workers. Claimant vaguely recalls moving his motorcycle out of the parking space where he initially parked to another parking lot before leaving work. Conversely, claimant testified he recalls feeling dizzy when he left the plant in the wee hours of August 2, 2007.

Q. (Mr. Bangerter) Do you recall anything at all about how you felt when you left the plant on, it would have been either the late hours of August 1st or the early hours of August 2d?

A. (Claimant) No, I mean, because what I told you a while ago, I did feel a dizzy spell, and I was on the bike, moving on the bike, but I thought to myself, when I got on the highway and got the wind in my face I would probably feel better, so I really thought things were going to be okay.¹

According to claimant, that was the first time the night of August 1 and morning of August 2, 2007, that he had felt dizzy.²

¹ Schroeder Depo. at 24, 25.

² *Id.* at 39.

Claimant does not recall why he did not turn when he reached the end of respondent's drive but, instead, crossed the street and struck the fence on the far side of the four-lane street. Nor does claimant recall how much time transpired between being told he could not work and actually leaving the plant. Conversely, after being told he should go home, he does recall that he felt good enough that he could continue working other than on the kill floor.³

Claimant has experienced high blood pressure for approximately 15 years. Over the last five of the 13-plus years that he has worked for respondent, claimant recalls at least three times that the medical station summoned an ambulance and approximately four times the medical station telephoned his wife to take him home due to his high blood pressure readings.⁴ But most often, about two or three times a week, claimant would sit down and relax to lower his blood pressure and feel better. Indeed, on the work shift that ended the morning of August 1, 2007, claimant checked his blood pressure at respondent's medical station and was found to have readings of 160/110.⁵ But despite being told to go home that night, claimant declined and continued working.

EMT Slattery testified he remembers claimant coming into the medical station on August 1, 2007, at about 8:30 p.m. to have his blood pressure checked as he was not feeling well. Mr. Slattery told claimant to sit awhile, which claimant did for a short time before receiving a call and leaving the station. Claimant returned to the medical station between approximately 9:30 p.m. and 10:30 p.m. and again told Mr. Slattery he was not feeling well. Claimant denied having a headache or feeling dizzy, but his blood pressure was 156/110. Mr. Slattery told claimant, as he had the previous evening, to go home. Mr. Slattery, who had not reviewed claimant's medical chart, was not then aware that on some past occasions a company nurse telephoned claimant's wife to pick claimant up when he had high blood pressure.

Mr. Slattery does not know what claimant did between leaving the medical station around 10:00 p.m. or 10:30 p.m. and his accident, which occurred at approximately 1:00 a.m. According to Mr. Slattery he was concerned about claimant's safety because of both his blood pressure and his professed inexperience on his new motorcycle.

After claimant's accident, Mr. Slattery went to the accident site, arriving shortly after an ambulance and the police. Mr. Slattery found claimant sitting on the motorcycle, which

³ *Id.* at 42.

⁴ *Id.* at 11, 12.

⁵ Khan Depo., Ex. 1.

was still running, and moaning. Mr. Slattery held the motorcycle while others removed claimant from the bike.

Mr. Slattery, who has contracted with respondent to work on an as-needed basis, testified he has neither read nor been instructed to read respondent's policy manual. Moreover, he does not know whether respondent has any policy for either when a worker should be sent home due to a medical condition or when a worker should be driven home due to high blood pressure. Nonetheless, he testified workers are taken home when they are dizzy "or anything like that."⁶ And for high blood pressure, Mr. Slattery stated he would have a worker taken home if their systolic (upper) reading was well above 200 or their diastolic (lower) reading was 130 to 140.⁷

Mr. Slattery also addressed the traffic at the intersection where claimant's accident occurred. He testified the traffic was very heavy and the street dangerous when the shifts ended at respondent's plant. At other than shift change, however, there might be no traffic at all.

Claimant presented the testimony of LPN Debra Jenson, who worked in respondent's medical station for approximately seven years through June 2007. Nurse Jenson testified claimant came to the medical station for blood pressure checks on a regular basis. It was Ms. Jenson's practice to call claimant's wife to come pick him up whenever his blood pressure readings were high, which she initially testified averaged every other month.⁸ But Ms. Jenson later testified that over the last four years she worked for respondent claimant came into the medical station to check his blood pressure every other month.⁹

Ms. Jenson confirmed that when she worked for respondent the company did not have a written policy regarding when injured or ill workers should be permitted to drive themselves home as opposed to someone driving them home. She also confirmed that generally medical notes were not made at the medical station or entered into a worker's medical records for non-occupational problems. Moreover, Ms. Jenson felt a blood

⁶ Slattery Depo. at 31.

⁷ *Id.* at 31, 32.

⁸ Jenson Depo. at 26.

⁹ *Id.* at 59.

pressure reading of 156/110 was too high for anyone to operate a motorcycle. And she also testified she would not let anyone work who had a diastolic blood pressure at 110.¹⁰

Claimant also presented the testimony of Norma Clark, who worked in respondent's medical station as a nursing clerk. Ms. Clark, who has worked for respondent for more than 12 years, is trained as a CNA, CMA, and restorative aide. According to Ms. Clark, claimant came into the medical station several times a week to have his blood pressure checked. Most times that Ms. Clark checked claimant's blood pressure, his readings were not very high. Indeed, Ms. Clark initially testified she recalled no instance where she summoned the nurse or EMT due to claimant having high blood pressure.¹¹ She, however, later testified that sometimes claimant's blood pressure was up but he did not have any other symptoms, at which time she would summon the nurse. Nonetheless, she is aware of approximately eight or nine times when the medical station sent claimant home.

Ms. Clark also confirmed that when Ms. Jenson sent claimant home Ms. Jenson would usually call his wife to come pick him up. And in those instances, claimant would either be dizzy, experiencing chest pain, or just not feeling right.¹² On the other hand, Ms. Clark does not recall any occasion when claimant was sent home merely due to a high blood pressure reading.

Ms. Clark confirmed the nurse or EMT on duty at the medical station determined whether a worker would be sent home. Likewise, Ms. Clark confirmed the nurses did not permit anyone who was dizzy to drive themselves home. Ms. Clark, however, contradicted Ms. Jenson's testimony as there were two times that Ms. Clark remembered when Ms. Jenson permitted claimant to return to work despite having a diastolic blood pressure reading over 110.¹³ Indeed, Ms. Clark recalls other workers that Ms. Jenson permitted to work with a similar reading. According to Ms. Clark, Ms. Jenson allowed workers with high blood pressure readings to continue working as long as they were asymptomatic.¹⁴

Claimant likewise presented the testimony of Kelin Valladares, who worked as a certified nurses' assistant in respondent's medical station and who spoke with claimant when he arrived at work on August 1, 2007. Ms. Valladares neither witnessed the accident

¹⁰ *Id.* at 61.

¹¹ Clark Depo. at 7.

¹² *Id.* at 10.

¹³ *Id.* at 18.

¹⁴ *Id.* at 20.

nor spoke with anyone about the accident nor heard anyone talk about how the accident occurred. Nonetheless, claimant's attorney asked Ms. Valladares her opinion of why the accident occurred:

Q. (Mr. Pistotnik) What's your understanding of why the accident occurred?

A. (Ms. Valladares) Well, what I think is, and because what he had said to me, you know, the day when it happened, I mean the same day when it happened, was that he was scared of the bike, and that it was way too big for him. He went in there, like around seven o'clock, and just so excited, he was just happy, you know, just like a kid with a new toy and just happy about the bike, and I remember I said to him, "So Duane, have you took your wife for a ride yet?" And he's like, "No, you know, I want to -- I want to have full control of the bike first. You know, I want to have more confidence, you know, that I can ride the bike, because I'm having a little problem turning, you know, because it's too big, so I'm a little scared of it," so what I think is that yeah, he was too scared of the bike. I mean, it was such a big bike. That's all, I mean --¹⁵

More importantly, Ms. Valladares thought claimant appeared fine when she saw him later in the evening as he was leaving the medical station shortly before his accident.¹⁶

Claimant also presented the testimony of Susan Stephens, who is respondent's workers compensation coordinator. According to Ms. Stephens, OSHA only requires respondent to have a staffed first aid station for work-related injuries but respondent, as a courtesy to its employees, permits its employees to utilize the medical station for non-occupational problems.¹⁷ And although respondent's policy manual does not differentiate between work-related and non-occupational problems, Ms. Stephens confirmed that its medical station does not generally keep medical records concerning the non-occupational problems and the medical station's staff will merely assess the worker's condition and inform the worker what should be done. Nonetheless, one of the stated objectives of respondent's medical services program is to maintain complete medical records.¹⁸

The only physician to testify, board-certified cardiologist Muhammad A. Khan, M.D., was asked by respondent and its insurance carrier to render an opinion in this claim. Dr. Khan, who treats many patients with uncontrolled high blood pressure in his medical

¹⁵ Valladares Depo. at 27, 28.

¹⁶ *Id.* at 33.

¹⁷ Stephens Depo. at 8.

¹⁸ *Id.* at 9.

practice in Dodge City, Kansas, testified such patients are permitted to work and drive as long as they are not having any symptoms such as chest pain, shortness of breath, headache, or dizziness. The doctor, however, testified he was not familiar with any blood pressure standards set forth by the Kansas Department of Motor Vehicles or the Federal Motor Carriers Safety Regulations.

The doctor testified, in part:

Q. (Mr. Bangerter) Is it not uncommon [in the doctor's practice] to see blood pressures of 156 over 110 or higher?

A. (Dr. Khan) I see quite a bit of high blood pressure, and one of the reasons, as I mentioned, is that we do get a lot of referrals for uncontrolled blood pressure and along those lines, so we probably see, every day, several patients with blood pressures that high.

Q. And do you allow those folks to leave your office and to drive themselves home?

Mr. Pistotnik: Object as [to] relevancy.

. . . .

A. I do let them drive. We would -- we would generally, in the office, discuss with them how they are feeling, and if they are having any problems. If they are not having any problems, and if they are not having any chest pain, any shortness of breath, any headache, dizziness, or symptoms such like that I mentioned, then we would let them drive, and we do that very commonly and we do that almost -- as I said, we see two or three of these kind of patients every day, and it's very common for us to let them drive, let them leave the office in that kind of scenario. Now, we will address them -- we will treat them, we will make recommendations and adjustments in medicines, but we certainly let them go out of the office and function.¹⁹

. . . .

Q. Would you take the person [someone with a blood pressure reading of 156/110] off work?

A. I would not take them off work unless they are having some problems. As I said, we see a lot of patients with blood pressure 160/110, in that range, and many times they are not having any kind of problems, and what we would do is we continue to let them work, as long as it's not very, very strenuous work, because that

¹⁹ Khan Depo. at 5, 6.

sometimes can raise the blood pressure further. As a matter of fact, one of the dimensions that we advise patients with high blood pressure is exercise and losing weight, but if somebody is really, really hypertensive, we advise them not to do strenuous activity, but they can certainly work, and we will, at the same time, adjust medications.²⁰

Blood pressure of 156/110 does not raise a lot of concern in Dr. Khan as he may see four or five patients every day with similar readings.²¹

Dr. Khan also explained how blood pressure is a dynamic phenomenon that can vary from minute to minute. Consequently, there is no way to estimate what claimant's blood pressure would have been when he left the medical station or when he left respondent's plant on his motorcycle immediately before his accident.

Claimant is unable to testify as to how the accident occurred. Neither party presented any other person who witnessed the accident. Claimant, however, presented the testimony of Dodge City police officer Robert Strader, II. Officer Strader testified that a female employee of respondent who was at the accident scene mentioned that she had heard somebody say claimant was slumped over when his motorcycle crossed the road. The officer testified, in part:

Q. (Mr. Pistotnik) And who all was present?

A. (Officer Strader) When I first got there, there was -- there was a female, heavier set Hispanic gal that works at National Beef, I don't know what her name was; but she was there, and then there was some people standing across the street, but she was the only one that was across the street there [at the accident scene].

. . . .

Q. And you didn't get any name at all from her?

A. No. By the time -- because as soon as I started talking to her, EMS got there. I helped EMS get him off, and then that's when she -- I did talk to her just a second. The only thing she made the comment was that she had heard somebody say that he was slumped over when he went across the road, and then by the time I got EMS off, I referred that to them, and she went back across the road, and I don't know where she went after that.

²⁰ *Id.* at 10, 11.

²¹ *Id.* at 32.

Q. Okay. So she basically gave you information about what someone else had told her about him being slumped over?

A. Right.

Q. Did you attempt to locate that individual?

A. No, I didn't, because I had no idea who it was.²²

Respondent and its insurance carrier did not contemporaneously object to the above testimony. But they later lodged the following objection:

Mr. Bangerter: Before we go off the record and before I forget, I would object to the witness, who we don't know who it is, commenting about something that someone else may have said who we don't know who it is, as being hearsay on hearsay and inadmissible.

Mr. Pistotnik: And my position is that's all part of the Res gestae of the accident. You can still call them.²³

Officer Strader investigated the accident scene. He did not find skid marks or evidence of any other type of evasive maneuver. He did, however, find the back tire had dug into the gravel, which indicated the motorcycle still had power to the rear wheel when it hit the fence.

When preparing the accident report, Officer Strader concluded claimant was either ill or had a medical condition that contributed to his accident on the basis of how he found claimant slumped over, what the unknown female had told him at the scene, and that someone had told him claimant had been in respondent's medical station before the accident.²⁴

Accidents occurring while workers are going to work or leaving work are generally not compensable under the Workers Compensation Act. But there are exceptions as K.S.A. 2006 Supp. 44-508(f) provides, in part:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee

²² Strader Depo. at 5, 6.

²³ *Id.* at 9.

²⁴ *Id.* at 10.

occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .

Accordingly, when the accident occurs (1) as the result of the employer's negligence, or (2) on the employer's premises, or (3) on the *only* route to or from work that involves a special risk, the general rule does not apply. As claimant's accident did not occur on respondent's premises, only the negligence exception and the special risk exception to the going and coming rule relate to this claim.

The negligence exception

For negligence to exist there must be a duty and a breach of that duty. Claimant argues respondent was negligent as the medical station failed to telephone and request his wife to come pick him up from work and, instead, permitted him to drive home.

The undersigned Board Member, however, finds the evidence fails to establish that respondent breached an accepted standard of care by permitting claimant to drive home. First, there is no indication claimant was dizzy, had chest pain, had headaches, or was having any other symptom that would have raised a concern in respondent's medical staff about claimant's ability to drive home on the evening of August 1, 2007, when he was advised to go home. Second, Dr. Khan, who was the only physician to testify, indicated that he would not have been concerned about claimant's ability to drive with the blood pressure readings that respondent's medical station found.

Claimant mentioned in his brief that it was arguable respondent was negligent in failing to keep medical notes detailing claimant's visits to the medical station. The evidence, however, does not establish that the lack of respondent's record keeping was the proximate cause of claimant's accident.

The special risk or hazard exception

The drive claimant used to leave respondent's plant ended at the four-lane street that ran along the south side of respondent's property. The drive did not continue on the other side of the street, which claimant argued at oral argument before the Board comprised the prerequisite special risk or hazard to make this claim compensable. But to qualify for that exception to the going and coming rule, the special risk or hazard must be on the *only available* route to or from work (and on a route that is not used by the public

except in dealings with the employer). At this juncture, the evidence fails to establish that immediately before the accident claimant was on the only available route to or from respondent's plant.

Q. (Mr. Bangerter) Okay. And so you would have -- when you came to work did you come in this drive right there by the letter A [looking at aerial photo]?

A. (Claimant) No. I came in through the east guard shack, and came around and parked in front of this building. (Indicating)

Q. Okay. And the east guard shack is over here? (Indicating)

A. It's further down. Well, that's -- oh, yeah. That's not the one I'm talking about though. That's for USDA parking.

Q. Okay. To get over here to the motorcycle parking lot, do you have to go in through the entrance where the letter A is?

A. Yes.

Q. Okay. And is that the way you came in then?

A. No. You mean after -- right before the wreck?

Q. Well, the day of the wreck, on August 1st, about seven o'clock I think.

A. No. I came through the east guard shack, where fabrication employees park.²⁵

In conclusion, claimant has failed to prove his motorcycle accident arose out of and in the course of his employment with respondent. Accordingly, the preliminary hearing Order must be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

²⁵ Schroeder Depo. at 30, 31.

²⁶ K.S.A. 44-534a.

WHEREFORE, the undersigned Board Member affirms the December 17, 2007, Order Denying Benefits entered by Administrative Law Judge Pamela J. Fuller.

IT IS SO ORDERED.

Dated this ____ day of February, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge